(16,339.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 201.

JOHN Q. BROWN, AS ASSIGNEE OF LAFAYETTE AND E. B. BAXTER, PLAINTIFF IN ERROR,

vs.

THE MARION NATIONAL BANK OF LEBANON, KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 3, 1897.

a UNITED STATES OF AMERICA, } ss:
District of Kentucky, }

To the Marion National Bank of Lebanon, Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington on the 10th day of July next, pursuant to a writ of error filed in the clerk's office of the court of appeals of Kentucky, wherein John Q. Brown, as assignee of Lafayette and E. B. Baxter, is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable William S. Pryor, chief justice of the court of appeals of Kentucky, this 13 day of June, in the year of our Lord 1896.

WILL. S. PRYOR,
Chief Justice of Kentucky.

Service of this citation is hereby accepted.

MARION NAT. BANK,
By W. J. LISLE, *Att'y.*

June 15, '96.

1 Pleas before the honorable the court of appeals of Kentucky, at the capitol, in Frankfort, on the 20th day of February, A. D. 1892.

Present: Chief Justice William H. Holt and Associate Judges Caswell Bennett and Joseph H. Lewis.

J. Q. BROWN, Assignee, &c., Appellants,
vs.
MARION NATIONAL BANK, Appellee. } Caption.

Be it remembered that heretofore, to wit, on the 10th day of August, 1891, the appellants, by counsel, filed a transcript of record in the office of the clerk of the Kentucky court of appeals in words and figures following, to wit:

Court of Appeals of Kentucky.

J. Q. BROWN, Assignee, &c., Appellant,
vs.
MARION NATIONAL BANK, Appellee.

Appeal from judgment of Marion circuit court rendered at its June term, 1891.

Record, page 18. No summons.

RIVES & SPALDING,
Counsel for Appellant.

STATE OF KENTUCKY:

Marion Circuit Court, June Term, 1891.

2 Pleas before the Hon. Wm. E. Russell, judge of the Marion circuit court, at the court-house, in Lebanon, Marion county, Kentucky, had on the 17th day of June, 1891, A. D., in the action in said court styled J. Q. Brown, assignee, *vc.*, Lafayette Baxter & Ed. Baxter, plaintiffs, *vs.* The Marion National Bank, defendant.

J. Q. BROWN, Assignee, *vc.*, Lafayette Baxter and E. B. Baxter, Plaintiffs,
vs.
THE MARION NATIONAL BANK, Defendant.
} Petition in Equity.

Plaintiffs say that on the 28th day of Nov., 1890, Lafayette and Ed. Baxter severally conveyed all their estate, save legal exemptions, to plaintiff J. Q. Brown in trust for their respective creditors, to be converted into money and distributed in accordance with the legal and equitable rights of each. Plaintiff Brown qualified duly as trustee, and has in his hands in process of settlement the estates conveyed to him by his said coplaintiffs.

Defendant, The Marion National Bank, has been for many years and still is a corporation organized and carrying on a banking business in the city of Lebanon, in Marion county, Kentucky, under and by virtue of the provisions of an act of Congress of the United States authorizing national banks.

Plaintiff Lafayette Baxter prior to Oct. 24th, 1885, had borrowed from the defendant various sums of money, for which he had
3 executed divers notes with plaintiff E. B. Baxter and one W. A. Baxter as his sureties, and said notes had been from time to time renewed until on the said 24th day of October, 1885, the several renewal notes then due were consolidated and renewed with one note, signed by the same parties, for $4,990.00. The last-mentioned note was from time to time renewed until April 29th, 1889, by the same parties, at which time, W. A. Baxter having died, the note intended as a renewal was executed by Lafayette and E. B. Baxter alone for $4,500.00, due four months thereafter. All the aforesaid notes and renewals thereof stipulated to bear interest at a rate exceeding 6 per cent. per annum, then and now the highest rate of interest allowed by the laws of Kentucky, and at each renewal the usurious interest was calculated and included in the face of the several notes, thereby increasing the amount nominally due defendant from plaintiff Lafayette Baxter. Plaintiff Lafayette Baxter at various times had to his credit in defendant's bank funds which were by defendant appropriated as credits or payments on the notes then held by it and afterward renewed, as aforesaid, and all said credits or payments should be applied to reduce the principal of the debt due from Lafayette Baxter, disregarding all calculations of interest at the usurious or illegal rate charged or at any rate. On April 29th, 1889, the date of the note for $4,500.00, most, if not all, of the amount then claimed by defendant to be due from

plaintiff Lafayette Baxter was made up of interest calculated
4 and charged at a rate exceeding that allowed by the laws of Kentucky, and if the execution of the said $4,500.00 note on that day by Lafayette & E. B. Baxter should be regarded as a payment of the note theretofore executed by Lafayette Baxter, E. B. Baxter, and W. A. Baxter, then plaintiff Lafayette Baxter thereby paid to defendant a large amount of usurious interest, and defendant is liable to plaintiff J. Q. Brown, as assignee, for double the amount of the interest so paid. Should said $4,500.00 note, however, be treated as merely a renewal of the former note and not a payment thereof, then the greater portion of said $4,500.00, being composed of usurious interest, as aforesaid, should be deducted from it before any part thereof should be paid.

On said $4,500.00 note, given April 29th, 1889, no interest has been paid, but the note was renewed from time to time by the same parties and for the same amount, the last renewal being for $4,500.00 and dated May 4th, 1890, due four months thereafter, and another separate note for $430.50, the usurious interest at 7 per cent. per annum, was on April 10, 1890, executed by Lafayette and E. B. Baxter. Both of said last-mentioned notes stipulate for 7 per cent. per annum interest, are now held by defendant, and asserted as claims against the estates of Lafayette and E. B. Baxter in the hands of plaintiff Brown, as assignee. In addition to the foregoing, defendant holds two other notes, each executed by E. B. and Lafayette Baxter, one for $650.00, of date Sept. 30th, 1890, and one for
5 $1,225.00, of date July 25th, 1890, and both due four months after their respective dates. Both of said notes are by defendant asserted as claims against the trust funds in the hands of plaintiff Brown, and both contain stipulations for the payment of interest at a greater rate than allowed by the laws of Kentucky, and both were given as renewals of other notes before that time, given by the same parties, and stipulating for a like usurious rate of interest. The other notes so renewed were renewals of still others, the two notes of $1,225.00 and $650.00 above mentioned being the last renewal notes of a long series evidencing the debt of E. B. Baxter to defendant, all of which were contracts for payments of a greater rate of interest than allowed by the laws of the State.

At each renewal the renewal notes were so written as to include the said usurious interest accrued and to accrue in the face of the notes, and by this means usurious interest has been added in until the two notes now held by defendant for $1,225.00 and $650.00, respectively, are largely, if not entirely, composed of interest, which plaintiffs are under the obligation to pay. Plaintiffs have no memorandum of the dates or amounts of the several notes renewed, as here-before set out, or of the dates or amounts of the several payments thereon, and they cannot accurately state the amount of usury paid or the amount carried forward and included in the several notes now held by defendant, but plaintiffs say that Lafayette and E. B. Baxter relied on defendant to keep a correct ac-
6 count of the various transactions mentioned, which defendant undertook to do and now has sufficient memorandum

and records of all said transactions to furnish accurate information of the same. Plaintiff asks that defendant be required to answer fully, disclosing the dates and amounts of the loans to each of plaintiffs Lafayette and E. B. Baxter, the dates and amounts of the several payments by them, the dates and amounts of the several notes renewed by them and the rate of interest borne by each, together with the amount of the several notes renewed and the rate of interest borne by each, together with the amount of interest included in the face of each note so given, and also the amount of interest included in the face of each of the notes now held by it and against each of plaintiffs; they further ask that judgment be entered against defendant for double the amount of interest paid to it by each of plaintiffs Lafayette and E B. Baxter and that defendant be required to enter credits on the notes now held by it for amounts equal to the interest included in their face, whether it had accrued before their respective dates or was to accrue thereafter, and that defendant be enjoined from collecting or demanding any interest on either of the several debts owing to it by plaintiffs if it should appear that any debt was so owing. Plaintiffs ask that this suit be consolidated with the suit of J. Q. Brown, assignee, *vc.*, *vs.* E. B. and Lafayette Baxter, *vc.*, Nos. 2013 in equity, now pending in this court for the settlement of the trust of laintiff Brown. Plaintiffs pray for
7 all proper, general, and special relief.

RIVES & SPALDING,
Att'ys for Plaintiff.

Plaintiffs annex to the foregoing petition these interrogatories to be answered by defendant as provided by law, to wit:

Int. 1st. When was the debt created, now evidenced by the note of Lafayette and E. B. Baxter for $4,500.00, of date May 4th, 1890, and what was the amount of the debt when created?

Int. 2nd. Answer the above question with reference to each of the three other notes now held by the Marion National bank against the two Baxters.

Int. 3rd. How much interest was included in the face of each original note, and how much future interest was included in each renewal note?

Int. 4th. What were the amounts and dates of the several payments on each debt, and what — the dates and amounts of the several renewal notes?

RIVES & SPALDING,
Att'ys for Plaintiffs.

Amendment to Petition.

Plaintiffs for their amendment to their foregoing petition state that the various contracts and stipulations for interest in excess of the rate authorized by the law of Kentucky were each knowingly made and entered into in each case at a rate known by defendant, and interest was charged in each case at a rate known by defendant at the time to be in excess of the legal rate.

RIVES & SPALDING,
Att'y- for Pl'ffs.

Amended petition filed April 25th, 1891.

B. J. LANCASTER, *Clerk.*

8 Endorsed: Petition and interrogatories filed, tax paid, and summons issued. April2 1st, 1891. B. J. Lancaster, clerk.

Marion Circuit Court, June Term, 1891.

J. Q. BROWN, Assignee, *vs.* THE MARION NAT. BANK. } Order Filing Answer.

JUNE 10*th*, 1891.

This day came the defendant, The Marion National Bank, by attorney, and produced its answer and answer to interrogatories filed, which are ordered to be filed.

Marion Circuit Court.

J. Q. BROWN, Plaintiff, *vs.* MARION NAT. BANK, Def't. } Answer.

The defendant, The Marion National Bank, of Lebanon, says that it is true that Lafayette Baxter had borrowed of defendant at various times in past years various sums of money, for each of which sums when borrowed he executed said bank his note. The first of said borrowing by said Lafayette Baxter of defendant was June 9th, 1874, $482.30, some five years ago, viz., Oct., $24.85, and said Baxter's notes to defendant were all put into one note and given to this defendant by said Laf. Baxter for the sum of $4,990.50.

9 This note was then renewed by said Laf. Baxter to defendant some nine times. The last three months were each for the sum of $4,500.00, as follows: April 29th, 1889; Nov. 1st, 1889; May 4th, 1890, and the interest on said note actually paid by said Laf. Baxter to this defendant for the two years next before the institution of this suit, now the sum of $427.50 paid on said note, thus: April 29th, 1889, $160.25; Nov. 1st, 1889, $160.25, and May 4th, $107.00; the last time said note was renewed was May 4th, 1890, on 4 months' time. It is not true that at the different times said note was renewed and at the times the notes were renewed that made up the said $4,500 note at six per cent. per annum was the highest rate allowed by the laws of Kentucky, because when the first of said borrowing was done, which was in June, 1874, 10 per cent. per annum was allowed as a legal rate of interest that parties might contract to pay, and this continued as the legal rate of interest until Sept. 1st, 1876, when 8 per cent. per annum was substituted as the legal rate until April, 1878, when 6 per cent. per annum was adopted as the legal rate. It is not true that usurious interest was calculated and included in the face of the several notes each time they were renewed, nor should payments made by the said Laf. Baxter on said different notes be applied so as to reduce the princip*le* of the debts due from said Laf. Baxter. Such pay-

ments, except those made in two years next before the institution of this action, should be applied to the extinguishment of the interest agreed and covenanted to be paid this defendant by said Baxter.

10 This defendant says that it is true that a considerable part of said $4,500.00 note, executed May 4th, 1890, and on which defendant sued Laf. and E. B. Baxter before said parties made their trust deed to plaintiff, is composed of interest calculated and charged at a rate exceeding 6 per cent. per annum, but not all of the interest exceeded rates not allowed by the laws of Kentucky, as before stated, nor is this defendant in any event liable to plaintiff, the trustee, for more than double the amount of interest actually paid by said Laf. Baxter to defendant in the two years next before this suit was instituted *was instituted*. Said renewals were not a payment of anything or any amount. It is true this defendant holds a note for $430.50 of Laf. and Ed. Baxter. This note was originally given for $402.25 and has been renewed three times, the last renewal being for $430.50, date April 10th, 1890, and nothing has been paid on this note. Defendant holds two other notes—one for $1,225.00, date July 25th, 1890, and another for $650.00, date Sept. 30th, 1890. Both said notes are due four months after their respective dates. On these two notes E. B. Baxter was principal and Laf. Baxter surety. Said $650.00 is an amount that represents a loan made by this defendant to Ed. B. Baxter in 1880, in March, and which has been renewed every four months and accrued interest added in the note *in* the rate each time except on renewal. In 1880, July 9th, $8.35 was paid as interest, and on the last renewal $15.00, Sep. 30th, 1890, interest was paid, and on the second renewal before that, Jan. 24, 1890, a like amount of $15.00 in-

11 terest was paid, and these three payments of interest are all that have ever been made on said debt. Said $1,225.00 also represents a loan made by this defendant to said Ed. Baxter in 1880 and which has been renewed each four months up to last renewal. At many of these renewals the rate given would be increased by additional sums borrowed and added in with the interest. Nothing whatever has been paid on this note. When 10 per cent. was the conventional rate of interest, *on* aforesaid, this defendant did not charge said Baxter more than that rate, nor was he charged more than 8 per cent. when 8 per cent. was the legal rate of interest in this State, as before stated. Said note of $430.50 on Laf. Baxter and Ed. Baxter is here filed, marked A, and said note for $1,225.00 on Ed. Baxter and Laf. Baxter is herein filed, marked B, and said note for $650.00 on Ed. and Laf. Baxter is here filed as part hereof and marked C, and said $4,500.00 note on Laf. and Ed. Baxter is filed — an exhibit in the suit in the Marion circuit court of this defendant against said obligors. Said notes and each of them are just, due, and unpaid, nor are said notes or either of them entitled to any offsets or discounts. Said notes contain the following usury and amounts charged over legal rates of interest *or* by the laws of Kentucky provided: On $1,225 note, $176.00; on $650.00 note, $47.00; on said $4,500.00 note, 235.00, and on said $430.00,

$1590; and defendant, having answered, prays to be dismissed with its costs.

ROWNTREE & LISLE, *Att'ys.*

Marion National Bank, by J. M. Knott, says it believes the statements made in the foregoing answer are true.

J. M. KNOTT.

12 Subscribed and sworn to before me by J. M. Knott this June 9th, 1891.

B. J. LANCASTER, *Clerk.*

Endorsed: Filed in court June 10th, 1891. B. J. Lancaster, clerk.

Marion Circuit Court.

J. Q. BROWN, Assignee, *vs.* MARION NATIONAL BANK. } Answer to Interrogatories.

The defendant, The Marion National Bank, for answer to the interrogatories propounded with the petition *to* defendant, says, in answer to interrogatory 1st, No. 1, that the note of $4,500.00, Laf. and Ed. Baxter, was made June 9th, 1874, and when first created was $482.30; note No. 3371, $430.50, was made May 3rd, 1889, and when first created was $402.25; note $650, E. B. Baxter, was made March 6th, 1880, and when first created was for $308.65; note $1,225, Ed. Baxter, was made Sept. 13th, 1880, and when created was for $198.40. In $4500.00 note is included $1,964.70, interest added in note, and its various renewals, Sept. 15th, 1874, $100.00; Nov. 3rd, 1883, $301.00; Feb'y 28th, 1885, $437.00; April 10th, 1885, $1,086.00, and May 22nd, 1885, $1,200.00, were added; 473.50, interest, paid in cash as follows: March 13th, 1884, $46.00; April 29th, 1889, $160.25; November 1st, 1889, $160.25; May 4th, 1890, $107.00. The following payments were made: $282.70, April 24th, 1887, and $306.00, Nov. 5th, 1888.

13 The interest payment of $160.25, April 29th, 1889, was not paid in cash, but was included in note $402.25, made May 3rd, 1889. Dates and amounts of payments and renewals of the $4,500.00 note are as follows:

Sept. 15th, 1874, $603.15; Jan. 15th, 1875, $624.70.
May 18th, 1875, $647.05; Sept. 20th, 1875, $670.00.
Jan. 22nd, 1876, $693.75; May 22nd, 1876, $718.65.
Sept. 25th, 1876, $744.35; Jan. 27th, 1877, $770.95.
May 29th, 1877, $797.55; Oct. 2nd, 1877, $822.60.
Feb. 5th, 1878, $845.75; June 7th, 1878, $870.00.
Oct. 10th, 1878, $895.00; Feb'y 13th, 1879, $920.70.
June 16th, 1879, $946.50; Oct. 15th, 1879, $972.10.
Feb. 16th, 1880, $1,000.00; June 19th, 1880, $1,028.75.
Oct. 22nd, 1880, $1,058.00; Feb'y 25th, 1881, $1,084.50.
June 28th, 1881, $1,111.00; Oct. 31st, 1881, $1,138.50.
March 3rd, 1882, $1,167.25; July 23rd, 1882, $1,200.00.

Nov. 4th, 1882, $1,233.00; March 7th, 1883, $1,267.50.
July 10th, 1883, $1.303.00; Nov. 13th, 1883, $1,650,00.
March 13th, 1884, $1,650.00; July 16th, 1884, $1,697.00.
Nov. 18th, 1884, $1,745.50; Oct. 24th, 1885, $4,990.50.
April 24th, 1887, $4,777.00; Aug. 27th, 1887, $4,895.00.
Dec. 29th, 1887, $5,016; May 2nd, 1888, $5,141.00.
Sept. 5th, 1888, $5,201.00; Nov. 5th, 1888, $4,732.00.
April 29th, 1889, $4,500.00; Nov. 1st, 1889, $4,500.00.
May 4th, 1890, $4,500.

From June 9th, 1874, to Sept. 1st, 1876, legal rate was 10 per cent., and it was the rate charged by us from Sept. 1st, 1876, to April 1st, 1878; we charged 8 per cent., which was the legal rate.

14 In the $1,225.00 note (E. B. Baxter) and its various renewals is included $576.28 interest. No interest on this note was paid; May 31st, 1883, $143.17, and Feb. 6th, 1884, $306.15 were added to it, besides interest, as stated above. The dates and amounts of renewals are as follows:

Sept. 13th, 1880, $198.40; Jan. 14th, 1881, $204.00.
May 17th, 1881, $209.00; Sept. 20th, 1881, $214.00.
Jan. 21st, 1882, $220.00; May 23rd, 1882, $227.00.
Sept. 25th, 1882, $234.00, Jan. 28th, 1883, $241.50.
May 31st, 1883, $394.75; Oct. 3rd, 1883, $406.00.
Feb. 1st, 1884, $738.00; June 11th, 1884, $760.00.
Oct. 14th, 1884, $782; Feb. 17th, 1885, $805.00.
June 25th, 1885, $828.88; Oct. 23, 1885, $852.00.
Feb'y 26th, 1886, $902.00; Nov. 1st, 1886, $927.00.
March 4th, 1887, $953.00; July 5th, 1887, $978.00.
Nov. 10th, 1887, $1,003.00; March 13th, 1888, $1,028.50.
July 12th, 1888, $1,054; Nov. 13th, 1888, $1,080.00.
March 14th, 1889, $1,107; July 17th, 1889, $1,135.00.
Nov. 19th, 1889, $1,164; March 22nd, 1890, $1,194.
July 25th, 1890, $1,225.00.

On the $650 note (E. B. Baxter) and its various renewals is included $324.70 interest, and there was paid $38.65 interest in cash; $8.35, July 9th, 1880; $15.00, Jan'y 24th, 1890, and $15.00 Sept. 30th, 1890. There was a payment, $15.00, made on the principal. Dates and amounts of its renewals are as follows:

July 9th, 1880, 307.00; Nov. 12th, 1880, $315.50.
March 5th, 1881, $324.00; July 20th, 1881, $332.50.
15 Nov. 22nd, 1881, $341.00; March 23rd, 1882, $350.00.
July 24th, 1882, $360.00; Oct. 27th, 1882, $370.00.
March 30th, 1883, $380.00; Aug. 2nd, 1883, $390.00.
Dec. 5th, 1883, $401.00; April 8th, 1884, $412.00.
Aug. 11th, 1884, $423.50; Dec. 14th, 1884, $436.00.
April 17th, 1885, $449.00; Aug. 20th, 1885, $462.00.
Dec. 23rd, 1885, $475.00; April 26th, 1885, $488.50.
Sept. 2nd, 1886, $502.50; Jan. 4th, 1887, $516.50.
May 7th, 1887, $531.00; Sept. 10th, 1887, $546.00.
Jan. 12th, 1888, $560.00; May 12th, 1888, $575.00.
Sept. 14th, 1888, $590.00; Jan. 16th, 1889, $605.00.

May 18th, 1889, $620.00; Sept. 21st, 1889, $625.00.
Jan. 24th, 1890, $650.00; May 27th, 1890, $665.00.
Sept. 30th, 1890, $650.00.

On $430.50 (Laf. Baxter) note is included $28.25 interest; no interest paid in cash. The dates and amounts of renewals are as follows:

Aug. 6th, 1889, $410.00; Dec. 7th, 1889, $420.00.
April 10th, 1890, $430.50. The said following amounts, $100.00, Sept. 15th, 1874; $301.00, Nov. 3rd, 1883; $437.00, Feb'y 28th, 1885; $1,086, April 10th, 1885; $1,200.00, May 22nd, 1885, of additional sums borrowed were added in the rate at different times until in and after Oct. 24th, 1885, there was only one note for said different loans. I have answered interrogatories 2, 3, and 4 in above answer to interrogatory No. 1.

MARION NATIONAL BANK,
By J. M. KNOTT, *Cashier.*

16 Sworn to ans subscribed by J. M. Knott before me this June 9th, 1891.

B. J. LANCASTER, *Clerk.*

Endorsed: Filed in court June 10th, 1891. B. J. Lancaster, clerk.

Marion Circuit Court, June Term, 1891.

J. Q. BROWN, Assignee,
—
THE MARION NATIONAL BANK. } Order Filing Amended Answer.

JUNE 16TH, 1891.

This day came defendant, by att'y, and produced his amended answer, which is ordered to be filed.

Marion Circuit Court.

J. Q. BROWN, Assignee,
vs.
THE MARION NATIONAL BANK. } Amended Answer.

Defendant, The Marion National Bank, hereby amends its answer herein and says that it denies that all of said note for $430.50 was executed for usurious interest, as stated in the petition. Said note was originally given for $402.75 May 3rd, 1889. Of this $160.25 interest credited April 29th, 1889, was for interest on 4,732.00-dollar note. On May 14th, 1889, $232.00 was paid on said $4,732.00 note, which reduced it to $4,500.00. The $160.25 and $232.00 and the interest on this note makes the $402.75 note.

MARION NATIONAL BANK,
By RO. & LISLE.

17 Endorsed: Filed in court June 16th, 1891. B. J. Lancaster, clerk.

The deposition of J. M. KNOTT, who, being duly sworn, says:

By COUNSEL FOR PLAINTIFF: On what note, for what time, at what rate was the interest calculated that made up the consideration for the $430.50 note of May 3rd, 1889, or the note of which it was a renewal and which you say was originally $402.25, and when was said original note given?

Ans. On $4,500.00 note for 6 months, at 7 per cent. interest, $160.25 of it, and the balance, $232.00, was paid on note May 14th, 1889, and reduced it from $4,732 to $4,500.00.

By same. On July 9th, 1880, how much money was loaned E. B. Baxter as the consideration for the note of that note mentioned in your answer to interrogatories filed with that petition?

Ans. Three hundred dollars.

By same. How much money was loaned E. B. Baxter Sept. 13th, 1880, as the consideration for the note of that note of that date for $198.40; how much for adding $143.17 May 31st, 1883, and $306.15 Feb'y 6th, 1884?

Ans. $194.00 Sept. 13th, 1880; $139.40 May 31st, 1883; $299.50 Feb'y 6th, 1884.

By same. Was the excess of $24.25 of the note of June 7, 1878, over that of Feb'y 5th, 1878 (845.75), added in as interest for a time subsequent to June 7th, 1878; if so, at what rate?

18 Ans. Yes; and rate 8 per cent.

By same. On Nov. 3rd, 1883, how much money did Laf. Baxter get as the consideration for adding $301.00 to the note, which on July 10th, 1883, was $1,303.00? How much for adding $437.00 Feb. 28th, 1885; $1,086 April 10th, 1885, and $1,200.00 May 22nd, 1885?

Ans. $289.50 Nov. 3rd, 1883. On June 26th, 1883, he got $160.00, and in Oct. 17th, 1883, 229.10, and interest added on this from time to time made $437.00. Feb. 28th, 1885, interest *was* charged was over 6 per cent. On Dec. 1st, 1883, he got $972.25, and interest was added over 6 per cent. from time to time, making $1,086.00 April 10th, 1885. On Jan. 13th, 1882, he got $419.85, and Sept. 1st, 1883, he got $583.50 and interest added from time to time, making $1,200.00. May 22nd, 1885, rate charged was over 6 per cent.

By same. What was added to the $745.50 note of date Nov. 14th, 1884, and included in the note for $4,990.50 of date Oct. 24th, 1885, besides the $437.00, $1,086.00, and $1,200.00 mentioned in last preceding answer?

Ans. Interest on note some months before Oct. 24th, 1885, and after Oct. 24th, 1885, to April 24th, 1887.

J. M. KNOTT.

Endorsed: Received from the hands of W. J. Lisle and filed this June 16th, 1891. B. J. Lancaster, clerk.

Marion Circuit Court, June Term, 1891—June 17th, 1891.

19 J. Q. BROWN, Assignee,
vs.
THE MARION NATIONAL BANK. } Judgment.

This action having been called, it was agreed by the parties that the action might be submitted for adjudication as though the pleadings had been made up ninety days, and the action having been accordingly submitted for adjudication and the court, being sufficiently advised, adjudges as follows: It appears from the pleadings and proof that within two years from the institution of this action the following sums were paid to said bank by said obligors on said three notes named in the pleadings at a greater rate of interest than 6 per cent., to wit, on said $4,500.00 note $160.25, paid Nov. 1st, 1889, and $107.00, paid May 4th, 1890, and on said $650 note $15.00 was paid Jan. 24th, 1890, and $15.00 Sept. 30th, 1890, making in all said interest so paid $297.25; and it is adjudged that as a penalty for the taking said interest said trustee shall recover of said bank twice the amount of said interest, to wit, the sum of $514.50, five hundred and fourteen dollars and fifty cents, and his costs herein expended; and it further appearing that each of said three notes on their respective faces bear- interest at the rate of seven per cent. per annum, it is adjudged that the entire interest which each of said notes carries, to wit, 7 per cent. on each note from the time as by its face and terms it bears 7 per cent., shall be forfeited, and the face of each of the said notes only, namely, $4,500.00, 430.50,
$650.00, $1,225.00, shall be held as value, legal and subsist-
20 ing obligations which said bank may present — prove against the estate of the respective obligors for payment *pro rata* or in full, as the case may be. To so much of above judgment as forfeit- only the interest accruing on the face of said notes and refuses to forfeit the interest including in the amounts for which said notes were given, namely, $4,500.00, 430.50, $650.00, and $1,225.00, and to the refusal of the court to give double the amount of $160.25 interest on the $4,500.00 note, paid April 29th, 1889, and included in the $430.00 debt, plaintiff excepts and prays an appeal to the court of appeals, which is granted him. This action is consolidated with that of said trustee Brown *vs.* E. B. and Laf. Baxter in this court.

Certificate.

I, B. J. Lancaster, clerk of the Marion circuit court, certify that the foregoing 19 pages and one page index, making in all 20 pages, contain a full and complete copy of all papers filed and orders made in the case of J. Q. Brown, assignee, *vs.* The Marion National Bank, as now appears from the records in my office.

Given under my hand this June 29th, 1891.

(Signed) B. J. LANCASTER,
Clerk Marion Circuit Court.

On the back of which was the following endorsement:
Court of appeals of Ky. J. Q. Brown, assignee, &c., *vs.* Marion National Bank. (See page 1.)

21 Afterwards, at a term of said court held in and for the Commonwealth of Kentucky, at the capitol, in Frankfort, on the 10th day of October, A. D. 1891, the following order was entered herein:

BROWN, Assignee,
vs.
MARION NATIONAL BANK, MARION.

"On motion of the appellee, by counsel, a cross-appeal is granted it herein, and it is ordered that the cause be submitted."

22 Afterwards, on the 20th day of February, A. D. 1892, at a court of appeals held as aforesaid, the following orders and judgment were entered herein, to wit:

J. Q. BROWN, Assignee, Appellant,
vs.
MARION NATIONAL BANK, Appellee.
} Appeal from the Marion Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed on the original appeal and affirmed on the cross-appeal and cause remanded for further proceedings consistent with the opinion herein, which is ordered to be certified to said court.

It is further considered that the appellants recover of the appellee his cost expended herein.

On the same day the said court, through —, delivered the following opinion:

J. Q. BROWN, Assignee, &c., Appellant,
vs.
MARION NATIONAL BANK, Appellee.

Appellant Brown, to whom a deed of trust was made by L. & E. Baxter for benefit of creditors, brought this action under section 5197–'8 Rev. Stats. U. S. to recover back from appellee, Marion National Bank, twice the amount of interest paid on certain promissory notes.

23 He had previously instituted another action for settlement of estates of the insolvent debtors and distribution of assets among creditors, in which appellee had presented and filed the notes mentioned for payment, and the two actions appear to have been consolidated, and the questions arising in each between parties to this appeal were determined by the judgment now before us for revision. That judgment was in substance for twice the amount of $297.25, made up of the following-recited sums paid as interest on two notes within two years prior to institution of

first-mentioned action at a greater rate than 6 per cent., to wit: On note for $4,500, $160 paid November 1, 1889, and $107 paid May 4th, 1890, and on a note for $650, $15 paid January 24th, 1890, and $15 September 30th, 1890. It was at the same time farther adjudged that the entire interest carried by the several notes filed be forfeited, as 7 per cent. per annum appears upon face of each as the rate charged, and that only the principal is payable out of the trust estate. The judgment was at the time excepted to by the plaintiff, now appellant, because, first, $160.25 interest paid April 29, 1889, on the note for $4,500 is not included; second, only interest on the several notes is adjudged forfeited, whereas all that had accrued previous to respective dates of and included in the amounts of them should have been. Appellee, on cross-appeal, seeks reversal because entitled to interest at 6 per cent. not allowed from date of the judgment. By sec. 5197 each national bank is authorized to take and charge interest at the rate allowed by law of the State where
24 it is situated; and section 5198 is as follows: The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carried with it or which has been agreed to be paid thereon. In case the greater rate of interest has been paid the person by whom it has been paid or his legal representative may recover back in an action in the nature of an action for debt twice the amount of interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction accrued."

Although there were four notes, upon each of which a greater rate of interest than allowed in this State, which is six per cent., is alleged to have been paid, judgment was rendered for that charged by and paid to appellee on two only; but as no exception was taken nor any complaint is now made of the apparent omission, we must assume there is no error on that account. We think, however, appellant is entitled to judgment for twice the amount of $160.25, paid April 29, 1889, on the note for $4,500, in addition to the sums recited, for the action appears to have been commenced April 25, 1891, within two years after the payment, and it is expressly admitted in the answer of appellee; but the other exception seems to us not well taken, for, according to the evident meaning of the section quoted, taking, receiving, or charging by a national
25 bank in this State a rate of interest greater than 6 per cent. is to be deemed a forfeiture of the entire interest which an existing note, bill, or other evidence of debt carries with it or which has been agreed to be paid thereon, not such interest as may have been carried with or agreed to be paid on a note already cancelled, either by payment or by renewal, whereby what was before interest has become interest-bearing principal.'

The usury law of this State is no guide in construing the statute under consideration, because entirely different. The section quoted was intended to accomplish two distinct objects, neither of which is authorized by statute of this State. One is to forfeit and bar recovery

of all interest carried by or agreed to be paid on any note, bill, or other evidence of debt sued on or presented for payment out of the estate of a decedent or insolvent debtor, when the rate may be greater than is allowed by law; and the other, to give to the debtor who has alread paid such greater rate the right to recover back twice the amount thereof, whether so paid on one or more notes or bills or upon one still in existence or fully paid off and cancelled, provided such action is commenced within two years after such usurious transaction.

There is no difficulty in understanding meaning of the last clause of the section, nor need there be any in properly interpreting and applying language of the first, for interest that has been either paid off or become by renewal part of the principal of a new note cannot be fairly regarded as being carried as interest with it,
26 much less can it be with propriety said to have been agreed to be paid on it.

By the judgment appellee was authorized to prove and present against the estate held by appellant in trust the demands of which the notes in question are evidence, and to receive *pro rata* the amount thereof, less interest. Such demands, when evidenced by judgment therefor, or, what is equivalent, when reported to court and allowed, of course, bear interest, but not before; and as the judgment in this case is not inconsistent with such view, it must be affirmed on cross-appeal, but, for the reason indicated, reversed on the appeal and remanded for farther proceedings.

Afterwards, on March 10, 1892, at a court of appeals held as aforesaid the following order was made herein:

BROWN, Assignee,
v.
MARION NATIONAL BANK. } Marion.

The appellant, by counsel, filed a petition and moved the court for a rehearing herein *herein*, and the cause is submitted on the said motion.

The following is the petition filed by the foregoing order:

Court of Appeals of Kentucky.

J. Q. BROWN, Assignee, &c.,
vs.
MARION NATIONAL BANK. } Petition for Rehearing.

After a careful study of the opinion rendered February 20th, 1892, we are convinced that the court overlooked important prin-
27 ciples and controlling decisions, to which we feel constrained by a sense of duty to the court, as well as to our client, to again call your attention.

The exact questions involved are perhaps new in this State, but the learning of other State courts has shed light upon them, and

the Federal Supreme Court has, as we conceive, settled them against the position taken by this court in this case.

In so far as concerns the application of the State statute to national banks, it is undoubtedly true, as this court says, that "the usury law of this State is no guide in construing the statute under consideration, because entirely different," but it would seem that the general principles applied by the courts to the construction of usury statutes ought not to be disregarded merely because the particular statute was different only in the penalties denounced from the act of Congress now under consideration. This court having considered the act of Congress without reference to other adjudications (so far as can be seen from the opinion), and looking alone to its wording, says, "according to the evident meaning of the section quoted, taking, receiving, or charging by a national bank in this State a rate of interest greater than six per cent. to be deemed a forfeiture—not of such interest as may have been carried with or agreed to be paid on a note already cancelled, either by payment or by renewal, whereby what was before interest has become interest-bearing principal." It is evident from the statute that if the
28 note is cancelled by payment the debtor may, as against the bank, enforce a penalty of double the amount of interest the note may have carried with it, yet by the opinion rendered the bank is not only saved from that penalty but awarded the machinery of the courts to collect the interest if, instead of paying at once, a new promise is made to pay the amount with interest compounded. The court went further and authorized the bank in this case to prove their claims, not alone for the interest that had been carried by the notes renewed, but for interest accruing after the execution of the notes now in question, calculated for four months and included in their face. Neither of these notes has ever been cancelled, either by renewal or payment, yet, if the opinion stands, appellant must pay that interest because his assignors promised to pay it, after a calculation of amount was made, instead of promising, before the calculation was made, to pay at a certain rate per cent. and calling it interest.

This act of Congress is operative in every State of the Union, and, that its operation may be uniform, it is necessary for the State courts to accept as authoritative the construction given by the U. S. Supreme Court, at least to the same extent that the local construction of State statutes is binding on Federal courts.

We fear that this court has overlooked the fact that the U. S. Supreme Court, in Bank *vs.* Dearing, 91 U. S., 29, has given to the statute in question a construction different from that which
29 seemed evident to your honors. In that case Dearing had executed his note to Deitmar for $2,000.00, payable one month after date, under an agreement that the bank would discount it. The bank received the note and paid to Dearing $1,981.67, reserving as discount from the face of the note $18.33. Mr. Justice Swayne, in concluding the opinion of the court said: "The plaintiff below (the bank) was entitled to recover the principal of the note sued on, less the amount of interest unlawfully reserved," thus

clearly recognizing the distinction between the face of the note, which includes interest, and the principal which may be recovered, a distinction which this court evidently overlooked. In the leading case of Barnet *vs.* National Bank, 98 U. S., 555, the circuit court for the southern district of Ohio had overruled a demurrer to the defense "that the bill in suit was the last of eight renewals; that illegal interest was taken upon the series to the amount of $1,116.00, which it was claimed should be applied as a payment upon the bill in question." A demurrer was sustained to two other defenses on the ground that each alleged actual payment of the usurious interest—a clear distinction was made between a payment and a renewal note, including the usurious interest in its face. In the latter case the amount of the usury so included could not be collected. The judgment of the circuit court was affirmed. The Supreme Court, in construing the statute, said, "Two categories are thus defined and the consequenses denounced:

"1. Where illegal interest has been knowingly stipulated for but not paid, there only the sum lent, without interest, can be
30 recovered.

"2. Where such illegal interest has been paid, then twice the amount so paid can be recovered, &c., &c." If not paid, the Federal courts will not compel its payment, whether the stipulation for its payment assume one form or another; whether it be a promise to pay it, as interest by name, or whether it be intended in a series of renewals.

The Federal courts do not, and we believe this court, after mature consideration, will not, hold that usury, the collection of which is forbidden and whose payment subjects the *reviewer* to a penalty of twice the amount, could in any case be a valid consideration for a note or promise given for its payment in whole or in part, or that the act of Congress aimed to suppress usury evidently requires such a construction. If it does or if such a construction is permissible, the statute is a snare and a delusion, for in every case of loans by national banks interest is added to the face of the note for the time it has to run, and a stipulation for interest, as interest, only after maturity. They would omit the stipulation for interest after maturity, and would require prompt renewals in order to avoid the fateful word "interest." It has been said that "a rose by another name would be as sweet, &c." and to national banks, as to other, money lenders, interest or pay for the use of money, which is called not "interest," but "commission," "discount," "principal," or any other name, would be equally acceptable.

We cannot see the magic in the word "interest," nor can
31 we believe it was the word, rather than the substance, that Congress had in view, or that a change of name would or should render the statute inoperative.

In Driesback *vs.* National Bank, 104 U. S., 52, which was a suit on the last of a series of renewals, it appeared that at each renewal the interest had been actually paid, and the court reaffirmed the decision in the Barnet case and the construction of the act then given, Chief Justice Waite saying: "The claim is not for interest

stipulated for and intended in the note sued on, but for the application of what has actually been paid as interest." The meaning is clear that if the interest had not been paid but included in the various renewals and carried on into the note sued on, which was the last, the forfeiture would have been applied and the collection of it forbidden by the court. The statute itself, in the clause immediately following the portion we have been considering, shows that the forfeiture was not intended by Congress to be restricted to interest denominated by the parties as interest or to the interest accruing on the face of the bill or note which should be the evidence of the loan; "but the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest," -c. "The pur-
32 chase or discount of a note payable at the place of purchase or discount at a greater rate than legal interest was certainly considered by Congress as taking, receiving, or reserving" within the forfeiture clause, even though the face of the note might not call for interest as "interest."

If it is illegal to agree to pay or receive interest or compensation for the use of money when it is stipulated for at a given rate per cent., we cannot see what principle of construction could make it legal if the calculation of the amount at the given rate be made in advance and the promise be to pay the lump sum, nor do we believe that this court will so hold or that usury can be a good consideration to uphold a promise to pay it, whether that promise be the first, second, tenth, or twentieth.

We respectfully ask a careful reconsideration of the questions involved and a rehearing of the case.

Respectfully submitted.

RIVES & SPALDING,
Counsel for Appellant.

Authorities cited:

91 U. S., 29, Bank *vs.* Dearing.
98 U. S., 555, Barnet *vs.* Nat'l Bank.
104 U. S., 52, Driesback *vs.* Nat'l Bank.

Afterwards, on March 24, 1892, the following order was made herein:

BROWN, Assignee,
v.
MARION NATIONAL BANK, Marion.

33 The court being sufficiently advised, it is considered that the petition for a rehearing herein be overruled.

Afterwards, on the 11th day of June, A. D. 1892, the plaintiff in error filed in the office of the clerk of the Kentucky court of appeals a writ of error and assignment of errors as follows:

UNITED STATES OF AMERICA, } ss:
District of Kentucky. }

The President of the United States of America to the judges of the court of appeals of Kentucky, Greeting:

Because in the record and proceedings and also in the rendition of a judgment of a plea, which is in the said court of appeals pending, before you, between John Q. Brown, as assignee of Lafayette and E. B. Baxter, plaintiff, and The Marion National Bank of Lebanon, Kentucky, defendant, a manifest error hath happened, to the great damage of the said John Q. Brown, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first day of the next October term of the said
34 Supreme Court, to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to law and the custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Frankfort, in said district, this 8th day of June, A. D. 1892, and of the Independence of the United States the 116th.

W. J. CHINN, JR.,
Clerk U. S. Circuit Court, Ky. Dist.

Writ of error allowed by—
WM. H. HOLT,
Ch. Justice of Kentucky.

The plaintiff in error filed in the said clerk's office his assignment of errors in words and figures following, to wit:

Assignment of Errors.

UNITED STATES OF AMERICA, } ss:
District of Kentucky. }

In the matter of John Q. Brown, plaintiff, *vs.* The Marion National Bank, defendant in error, plaintiff assigns for error the following, viz:

The court of appeals of Kentucky in said case erred in holding that the forfeiture of interest denounced in section 5197–'98 of the Revised Statutes of the United States does not apply to the interest accrued upon a series of notes, each a renewal of another,
35 and all given as evidence of the same loan where the interest has been calculated in advance and included in the face of the notes, but never paid.

The court of appeals erred in permitting appellee to prove the amount of the face of each of its four notes against the estates of the Baxters in the hands of appellant when each of said notes was made up in part of interest calculated in advance for a period of time subsequent to its date, and in part of interest which had been so calculated on notes of which the notes in suit were renewals.

The court of appeals erred in holding that a national bank could avoid the penalty and also the forfeiture denounced in said statute by obtaining a new promise for the payment of the usury, and could, on said new promise, maintain an action and recover by law what the statute has denounced as illegal, in effect holding that usury, though illegal, is a valid consideration for a promise to pay it, provided that promise is not the first promise made.

Respectfully submitted.

RIVES & SPALDING,
Att'ys for Appellant.

36 Pleas before the honorable the Kentucky court of appeals, held in and for the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 19th day of May, A. D. 1896—W. S. Prior, chief justice; J. H. Hazelrigg, Thomas H. Paynter, and J. I. Landes, associate justices, sitting.

Caption.

J. Q. BROWN, Assignee of Lafayette & E. B. Baxter, Appellants,
vs.
MARION NATIONAL BANK, Appellee.

Be it remembered that heretofore, to wit, on the 10th day of December, A. D. 1894, the appellant, by counsel, filed in the office of the clerk of the Kentucky court of appeals a transcript of record in words and figures following, to wit:

37 Pleas had on the 2nd day of October, 1894, before the Hon. Chas. Patteson, judge of the 11th judicial district of Kentucky, at the court-house, in Lebanon, Marion county, Ky., at the September term, 1894, of the Marion circuit court, held for the trial of Commonwealth's common-law and equity causes in the case of J. Q. Brown, assignee, &c., against The Marion National Bank, now pending in the Marion circuit court.

Marion Circuit Court, November Term, 13th Day—7th Day of December, 1891.

JNO. Q. BROWN, Assignee,
vs.
MARION NATIONAL BANK.

This day came parties, by attornies, and on their respective motions this cause is continued.

Marion Circuit Court, March Term, 14th Day—5th Day of April, 1892.

J. Q. BROWN, Assignee,
vs.
MARION NATIONAL BANK.

This day came parties, by attornies, and on their respective motions this cause is continued.

Marion Circuit Court, March Term, 15th Day—6th Day of April, 1892.

J. Q. BROWN, Assignee, &c., Pl'ff,
vs.
MARION NATIONAL BANK.

38 This day came plaintiff, by attorney, and produced the mandate of the court of appeals, which is in words and figures as follows, to wit:

COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

J. Q. BROWN, Assignee, &c., Appellants,
against
MARION NATIONAL BANK, Appellee.
} Appealed from a Judgment of the Marion Circuit Court.

FEBRUARY 20TH, 1892.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed on the original appeal and affirmed on the cross-appeal and cause remanded for further proceedings consistent with the opinion herein, which is ordered to be certified to said court.

A copy.
Attest:

A. ADDAMS, *C. C. A.*,
By ROB'T L. GREEN, *D. C.*

Issued March 28th, 1892.

Which mandate is ordered to be filed, and, in obedience to said mandate, it is ordered that said judgment be set aside and held for naught, and it is ordered that this cause be placed upon this court's docket for further proceedings, as directed by the order of the court of appeals.

Marion Circuit Court, June Term, 6th Day—18th Day of June, 1892.

39 J. Q. BROWN, &c., Pl'ff,
vs.
MARION NATIONAL BANK.

This day came parties, by attornies, and upon their motion this cause is continued.

Marion Circuit Court, November Term, 17th Day—16th Day of December, 1892.

J. Q. BROWN, Assignee, Pl'ff,
vs.
MARION NATIONAL BANK, Def't.

This day came parties, by attornies, and upon their respective motions this cause is continued.

Marion Circuit Court, January Term, 15th Day—8th Day of February, 1893.

J. Q. BROWN, Assignee, Pl'ff,
vs.
MARION NATIONAL BANK, Def't.

This day came parties, by attornies, and upon their motion this cause is continued.

Marion Circuit Court, April Term, 19th Day—15th Day of May, 1893.

J. Q. BROWN, Assignee, Pl'ff,
vs.
MARION NATIONAL BANK, Def't.

This day came parties, by attornies, and on their motion this cause is continued.

40 Marion Circuit Court, September Term, 4th Day—28th Day of September, 1893.

J. Q. BROWN, Assignee, Pl'ff,
vs.
MARION NATIONAL BANK, Def't.

This day came plaintiff's attorney in the foregoing cause, and on his motion it is stricken from the docket with leave to reinstate.

Marion Circuit Court, September Term, 8th Day—2nd Day of October, 1894.

J. Q. BROWN, Assignee, &c.,
vs.
MARION NATIONAL BANK.

This day came the parties, by attornies, and, it appearing to the court that the mandate and opinion of the court of appeals have heretofore been filed, it is now ordered and adjudged, in obedience to the said mandate and opinion, that the former judgment in this case be reversed, and that the Marion National bank be authorized to prove and present against the estate held in trust by J. Q. Brown,

assignee, the notes mentioned in the pleadings and to receive *pro rata* the amount thereof, less interest, on the amount of the face of said notes. It is further adjudged that plaintiff Brown recover of defendant, The Marion National Bank, the amount stated in the former judgment and the additional sum of $320.50, twice the amount of interest paid April 29th, 1889, on the $4,500.00 note. To this judgment plaintiff objected and excepted and prayed an
41 appeal to the court of appeals, which is granted.

Marion Circuit Court.

J. Q. BROWN, Assignee, &c., *vs.* THE MARION NATIONAL BANK. } Schedule.

The clerk will please copy for the court of appeals all the record in this case save what has heretofore been copied in accordance with former schedule filed.

Nov. 9th, 1894.

H. W. RIVES,
Att'y for Pl'ffs.

Endorsed: Filed with the clerk November 9th, 1894. B. J. Lancaster, cl'k, by Harry Lancaster, D. C.

STATE OF KENTUCKY, *Marion County,* } *sct:*

I, B. J. Lancaster, clerk of the Marion circuit court for the county and State aforesaid, certify that the foregoing 6 pages contain a true and complete copy of all the orders made and judgments entered, papers and exhibits filed in the case of J. Q. Brown, assignee, &c., *vs.* Marion National Bank, that has not heretofore been copied, as is shown by the records now on file in my office.

Given under my hand this 4th day of December, 1894.

B. J. LANCASTER,
Clerk Marion Circuit Court,
By HARRY LANCASTER, *D. C.*

42 On the back of said transcript the following endorsement was made:

J. Q. BROWN, Assignee, LAFAYETTE & E. B. BAXTER, Appellants, *vs.* MARION NATIONAL BANK, Appellee. } From Judgment of Marion Circuit Court, September Term, 1894, Record, Page 5.

No summons desired.

H. W. RIVES,
Counsel for Appellants.

Afterwards, to wit, on the 1st day of November, 1895, at a court of appeals held in and for the Commonwealth of Kentucky, at the capitol in Frankfort, the following order was made:

BROWN, Assignee, &c., Appellants,
vs.
MARION NATIONAL BANK, Appellee.

Ordered that this cause be submitted.

Afterwards, on the 19th day of May, 1896, at a court of appeals held as aforesaid, the following judgment and orders were entered:

J. Q. BROWN, Assignee, &c., Appellants,
vs.
MARION NATIONAL BANK, Appellee.
} Appeal from the Marion Circuit Court.

43 The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellants its costs herein expended.

On the same day, May 19, 1896, said court of appeals, through Judge Landes, delivered the following opinion:

J. Q. BROWN, Assignee, &c., Appellant,
vs.
MARION COUNTY NATIONAL BANK, Appellee.

This cause is before us again on appeal from the judgment entered in the court below on the mandate from the judgment rendered here on the former appeal, which is reported in 92 Ky. Rep., 607. The complaint is that in the judgment now appealed from the court below failed to deduct from the face of the notes allowed to be proved against the estate in the hands of the appellant, as assignee for the benefit of the creditors of L. and E. Baxter, usurious interest that had been embraced in the notes on renewals, and the case of Snyder *vs.* Mount Sterling National Bank, 94 Ky. Rep., 231, is referred to as inconsistent with the view expressed on that point in the opinion on the former appeal. The two cases are, undoubtedly, not in harmony on the point mentioned. Nevertheless, we hold that the judgment on the former appeal is the law of this case, and since the judgment now appealed from seems to be in accordance with the mandate from this court it must stand, and is therefore affirmed.

44 Afterwards, on the 13th day of June, 1896, the appellants filed in the office of said clerk of said court of appeals their writ of error herein as follows:

45 UNITED STATES OF AMERICA,
District of Kentucky, } *ss:*

The President of the United States of America to the judges of the court of appeals of Kentucky, Greeting:

Because in the record and proceedings, and also in the rendition of a judgment of a plea which is in the said court of appeals pend

ing, before you, between John Q. Brown, as assignee of Lafayette and E. B. Baxter, plaintiff, and The Marion National Bank of Lebanon, Kentucky, defendant, a manifest error hath happened, to the great damage of the said John Q. Brown, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the 10 day of July next, before the said Supreme Court, to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to law and the custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at Frankfort, in said district, this 13 day of June, A. D. 1896, and of the Independence of the United States the 120th year.

Seal 6th Circuit Court, Ky. Dis., U. S. of America.

W. J. CHINN,
Clerk U. S. Circuit Court, Ky. Dist.

Writ of error allowed by—
WILL. S. PRYOR,
Chief Justice of Ky.

[Endorsed:] Writ of error.

46 On the same day appellants filed in said clerk's office an assignment of errors as follows:

UNITED STATES OF AMERICA, *District of Kentucky*, } ss:

JOHN Q. BROWN, Plaintiff in Error,
vs.
THE MARION NATIONAL BANK, Defendant in Error.

Assignment of Errors.

Plaintiff assigns for error the following:

1st. The court of appeals of Kentucky in said case erred in deciding that the forfeiture of interest provided in secs. 5197–'98, Revised Statutes U. S., does not apply to interest accrued upon a series of notes each a renewal of another and all given as evidence of the same loan where the interest has been included in the face of the existing note, but never paid.

2nd. The court of appeals erred in permitting defendant in error to recover the amount of the face of each of its four notes against the estate of Lafayette and E. B. Baxter in the hands of plaintiff in

error, when the face of each of said notes included usurious interest, calculated in advance, to the date of its maturity, and also included usurious interest brought forward from other notes, of which the notes in suit were renewals.

3rd. The court of appeals erred in deciding that usurious interest is a valid consideration for a promissory note, and that recovery can be had in a court of equity for the amount of the face of the note.

Respectfully submitted.

H. W. RIVES,
For Plaintiff in Error.

47 COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, certify, in accordance with the writ of error herein, returned herewith, a copy of which is on file in my office, that the preceding forty-six pages contain a true, full, and complete transcript of the record and proceedings had in the said court in the cases of J. Q. Brown, assignee, appellant, against The Marion National Bank, appellee, on appeal from the Marion circuit court, together with a copy of the assignment of errors, all as appears from the record *and* on file in my office.

Seal Kentucky Court of Appeals.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done, at Frankfort, Kentucky, this 2d day of July, A. D. 1896.

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals.

Fee for this transcript, $15.10.

Endorsed on cover: Case No. 16,339. Kentucky court of appeals. Term No., 201. John Q. Brown, as assignee of Lafayette and E. B. Baxter, plaintiff in error, *vs.* The Marion National Bank of Lebanon, Kentucky. Filed July 17, 1896.

Supreme Court of the United States.

JOHN Q. BROWN, ASSIGNEE &C., PLAINTIFF IN ERROR,

vs.

THE MARION NATIONAL BANK, OF LEBANON, KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

Plaintiff in Error, as assignee for the benefit of creditors of Lafayette and E. B. Baxter, together with his assignors, instuted this suit against Defendant in Error, under the second clause of the 30th section of the Act of Congress of June 3, 1864, known as the National Bank Act, to recover the penalty of twice the amount of usurious interest paid to Defendant in Error.

In the same suit it was alleged that Plaintiff in Error had instituted in the Marion Circuit Court, an action for the settlement of his trust as assignee, for an ascertainment of creditors and for distribution of the assets in his hands: that Defendant in Error was asserting against those assets four separate claims, evidenced by notes for $4,500, $1,225, $430 and $650 respectively; that each note, in its face, carried with it a large amount of usurious interest, each being the last of a series of renewal notes, on which interest had not been paid, but carried forward and and included in the face of the new notes.

A consolidation of the two actions was asked, and an order enjoining Defendant in Error from collecting or demanding any interest on the amount of the several original

loans. The Circuit Court consolidated the actions and decreed that each of the four notes should be presented and proven against the estate of the Baxters in the hands of their assignee for the full amount of its face, forfeiting only such interest as had accrued on the face of each note, after maturity, at 7 per cent. per annum.

This portion of the decree was, on appeal, approved by the Appellate Court, and the case remanded for further proceedings; after which, on another appeal, the final judgment of the Circuit Court was affirmed by the Court of Appeals. From that decision of the Court of Appeals of Kentucky, this Writ of Error is prosecuted, and Plaintiff in Error assigns the following

SPECIFICATIONS OF ERROR.

1. The Court of Appeals of Kentucky erred in holding that the forfeiture of interest provided for in Sections 5197-98, U. S. Revised Statutes, does not apply to usurious interest accrued upon a series of notes, each a renewal of another, and all given as evidence of the same loan, where the interest has been included in the face of the existing note, but never paid.

2. The Court erred in permitting Defendant in Error to recover the amount of the face of each of its four notes against the estate of Lafayette and E. B. Baxter, when the face of each note included usurious interest calculated in advance to the date of its maturity, and also included usurious interest brought forward from other notes, of which the notes in suit were renewals, and given to secure the same loan.

3. The Court erred in deciding that usurious interest is a valid consideration for a promissory note, and that a court of equity should enforce payment to the full amount of its face.

ARGUMENT.

While the Act of Congress referred to (Revised Stats. Sec. 5197—98) is penal in its nature, it is also a remedial statute, and should be liberally construed to effect the ob-

ject of its enactment. *1 Blackstone 88, Potter's Dwarris, 260, Farmers' National Bank vs. Deering, 91 U. S. 35.*

The provisions of the statute may be enforced in the State Courts, and the form of proceedure will be regulated by the local rules of practice. *Bank vs. Deering. Supra. Bletz vs. Columbia National Bank, 30 Am. Rep. 343.*

While the rate of interest allowable is fixed by the State law (in Kentucky, 6 per cent. per annum.), the consequences of an excessive charge by a National Bank are not affected by local usury laws, but by the Act of Congress that is operative alike in every State. *Barnet vs National Bank,* 98 U. S. 555.

It has been the settled policy of our Government, State and National, to prevent an exhorbitant interest or profit for the use of money loaned. Usury, according to Mr. Tyler, in his work on the subject, (page 35) is "the taking "of more for the use of money than the law allows," and it is a familiar principle, universally applied in the construction of laws against usury, that any device resorted to for the purpose of evading them and obtaining more than the legal rate of interest on a loan, will be closely scrutinized, the intent of the parties ascertained, and the laws against usury applied. A sale of bank stock, of land, or of personal property, a sale or exchange of securities, or any other device to cover up a usurious transaction, will be probed, and the Statute applied when the circumstances are such as to induce the belief that the particular form of transaction was designed to evade the Statute. The general rule is that, as between the original parties, where a security is affected with usury, any other security substituted therefor, is likewise affected. *Davis vs. Garr, 55 Am. Dec. 397 and note.* This is the settled rule in Kentucky in applying the State laws against usury, (*Rudd vs. Planters' Bank, 78, Ky. 513*), but the Court of Appeals in this case declined to recognize the rule as applicable to the National Bank Act. That it should be applied in cases arising under that Act, and that the decision in this case was wrong

in principle, was expressly recognized by the Court of Appeals in a subsequent case, (*Sydner vs. Mt. Sterling National Bank, 94, Ky. 231*), in which the Court said, quoting from *Farmers' and Mechanic's Bank, of Mercer vs. Hoagland, U. S. Circuit Court, 7 Fed. Rep., 161*: "By the "terms of the Act of Congress the charging of such rates "of interest (in excess of the legal rate) worked a for- "feiture of the entire interest which the several notes car- "ried with them. Now such forfeiture was not waived by "the giving of subsequent notes, although, as respects "them, the agreed rate of interest was a legal rate. They "were mere renewals, and given without any new consid- "eration. Nor, did the new notes operate as payment of "the debts for which they were given. In so far, then, as "the notes in suit embrace the forfeited interest, they are "without consideration. Moreover, it is an established "principle that if there be usury in the original transac- "tion, it affects all consecutive securities, however remote, "growing out of it; and neither the renewal of an old, "nor the substitution of a new security, between the same "parties, can efface the usury. The bank incorporated in "the new notes usurious interest, previously charged, as a "part of the new principal, and this illegal consideration "pervaded the whole subsequent series of notes. Upon "each fresh renewal interest was charged upon usurious "interest, which had entered into the prior notes as princi- "pal."

It is unfortunate for Plaintiff in Error that our Court of Appeals declared the correct rule too late to remedy the injustice of its former decision in this case. We can only hope that this Court will apply to this case the rule now recognized by the Kentucky Court of Appeals as the only correct one. This Court has declared the same rule in the case of *McBroom vs. Scottish Mortgage and Land Investment Co. 153 U. S. 328—9*, in which is cited with approval the opinion of the District Court for the Western District of Pennsylvania, in *Duncan vs. First National Bank of Mt.*

Pleasant: "From the origin of the loan, from the retaining of the first discount, through all the renewals, up to "the time of final payment of the principal, or up to the "time of entering judgment, there is a *locus penitentiæ* for "the party taking the excessive interest. Any time till "then he may consider the excessive interest paid on account of the loan, and so apply it and lessen the principal. When payment is actually made, or judgment entered, the election is made, and if, as in this case, judgment is entered for the face of the notes, or full amount "of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause "of action is complete."

That including the excessive interest in the face of the note will not enable the holder to evade the forfeiture of the entire interest on the sum loaned, under the National Bank Act, had been long since decided in the case of *Bank vs. Deering*, *91 U. S. 29*.

In *Barnet vs. National Bank*, 98 *U. S.* 555, the Circuit Court for the Southern District of Ohio had overruled a demurrer to the de ense, "that the bill in suit was the last "of eight renewals; that illegal interest was taken upon "the series to the amount of $1,116.00, which it was "claimed should be applied as a payment upon the bill in "question." A demurrer had been sustained to two other defenses on the ground that each alleged actual payment of the usurious interest. The judgment was affirmed, this Court saying: "Two categories are thus defined and "the consequences denounced:

"1. Where illegal interest has been knowingly stipulated for but not paid, there only the sum lent, without "interest, can be recovered.

"2. Where such illegal interest has been *paid*, then "twice the amount so paid can be recovered, etc., etc."

If not actually paid, the Court will not compel its payment, whether it be promised, as interest, by name, or be included in the face of a series of renewal notes. Usury,

the collection of which is forbidden by law, and subjects the receiver to a penalty of twice the amount, can not be a valid consideration for a note or promise to pay it; to the extent of the usury the promise is void, and only the sum originally loaned may be recovered, less the amounts of the several payments on the *debt*. The debtor may, if he elect, actually pay the usurious interest, but the law will not apply, or permit the creditor to apply, a payment, made generally, to the satisfaction of usurious or illegal interest, rather than to the part of the note founded upon a valid consideration. After such general payment the creditor could not be subjected to the penalty of twice the amount, as for usury paid, for, until the whole sum lent is paid, or judgment taken for it disregarding the payments, he still has a *locus penitentiæ*, as said in the McBroom case, supra. In *Driesback vs. National Bank*, 104 U. S. 52, which was a suit on the last of a series of renewals, it appeared that at each renewal the interest had been actually paid. The decision in the Barnet case was reaffirmed, Chief Justice Waite saying: "The claim is not "for interest stipulated for and included in the note sued "on, but for the application of what has actually been *paid as interest*"

If, however, there had been a payment on a note, of which part of the consideration is good, as for the original loan, and part bad as for usurious interest, the payment will not be of interest *as interest*, but will be applied to that part of the note supported by a valid consideration.

It would seem that on principle and authority the decision of the Kentucky Court of Appeals in this case should be reversed, and the rule applied as now recognized by that Court in the case of *Sydner vs. Mt. Sterling National Bank, supra*. Defendant in Error should be permitted to prove against the assigned estate only the amount of its several original loans, less the payments that were, from time to time, made, not as payments of interest, but as payments on the debts.

Respectfully submitted.

H. W. RIVES,
For Plaintiff in Error.

E. J. McDERMOTT,
Of Counsel.

No. 201.

DEC 6
JAMES H. McK

Brief of Lisle for D. E.

Filed Dec. 6, 1897.

201

Supreme Court of the United States.

JOHN Q. BROWN, ASSIGNEE &C., PLAINTIFF IN ERROR,

vs.

THE MARION NATIONAL BANK OF LEBANON, KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

W. J. LISLE, Attorney for Defendant in Error.

Supreme Court of the United States.

JOHN Q. BROWN, ASSIGNEE &C., PLAINTIFF IN ERROR,

vs.

THE MARION NATIONAL BANK, OF LEBANON, KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

This was an action by John Q. Brown, assignee of Lafe and E. B. Baxter, in the Marion Circuit Court, State of Kentucky, against the Marion National Bank to have enforced against Defendant in Error, the United States Statutes on the subject of usury charged and collected by the Defendant as a National Bank. Plaintiffs in Error were indebted to the Bank in some four notes bearing interest at the rate of 7 per cent. per annum or one per cent. more than the State note. Plaintiff sought to have judgment for double the interest actually paid on these notes at their sundry renewals, and to have declared forfeited not only the interest called for on the face of each,

but such interest items as had from time to time been added in the body of the notes on renewals.

The Court will notice the United States Statute sec. 5098 provides that the taking, reserving, or charging a rate of interest greater than the State rate only works a forfeiture of the interest "when such taking is knowingly done"

The Circuit Court of Kentucky adjuged Defendant in Error to pay Plaintiff double the amount of the interest actually paid during the two years next preceeding the institution of the suit, and also adjuged as forfeited all the interest the notes bore on their face, and this decision the Court of Appeals of Kentucky, on appeal by Plaintiff in Error, affirmed as correct and remanded the case to the Circuit Court for judgment in conformity to opinion of Court of Appeals See. 92. K. Rep. 612. On writ of error the case then came to this Honorable Court and was dismissed because there had been no final judgmenf that this Court could review. 146. U. S. 619, 620.

In the Marion Circuit Court of Kentucky on the second day of October, 1894, judgment was entered in conformity to the mandate of the Court of Appeals of Kentucky and from which judgment Plaintiff in Error again appealed to the State Court of Appeals and the judgment below was affirmed, and from this judgment of the State Court of Appeals this case is now here by writ of error.

This honorable Court in commenting on the U. S. Statutes relating to National Banks charging more than the State rate, says a forfeiture under its provision should not be declared unless the facts upon which it must rest are clearly established. The Court farther uses this language:

"And since the courts uniformly incline against the declaration of a forfeiture, the party seeking such declation should show affirmatively the bank knowingly reserved usurious interest and should be held to make *convincing proof*

of every fact essential to forfeiture" Wheeler vs. Union National Bank Pittsburg 96 U. S. 268, 270. In Tiffany vs. National Bank state of Missouri, 85 U. S. 409, 413 says the Statute must receive a strict, that is, a literal construction.

In the case at bar the record shows Plaintiff in Error neither alleged, except by amendment to answer which Defendant was not summoned to answer, or proved that the charging of interest by Defendant in Error of a rate of interest greater than the state rate was *knowingly done.* Plaintiff in Error took the deposition of Mr. Knott, cashier of Defendant in Error, but wholly failed to prove by him that he, said cashier, knowingly charged more than the State rate of interest..

The record shows that on April 21, 1891, Plaintiff filed his original petition and interrogatories, paid state tax and had summons issued. On April 25, 1891, an amended petition was filed making the charge that the usurious charge was knowingly made. The record does not show any summons was ever issued on this amended petition. On June 10, 1891, the record shows Defendant in Error filed its answer to petition and answer to interrogatories. The record does not show the amended petition was filed in Court or in term time or was answer ever filed to it. There is nothing to show Defendant knew of this amendment or was repuired to respond to it. It was simply filed with the clerk.

The forfeiture provided for in the U. S. Statutes by the very terms of the Statute depends on the bank *knowingly charging* more interest than the State rate. This should be alleged and proven, and that beyond any reasonable question. Plaintiff's petition, which Def't alone was summoned to answer, does not make this charge nor does the proof any where show that the Def't bank at the time it made the interest charge did so knowing it was charging more than

the State rate. 10 per cent was the legal rate of interest in Kentucky (when the contract said so) from March 14, 1871 to Sept. 1, 1876. 8 per cent. was the rate from Sept. 1, 1876 to April 1, 1878, and from that time 6 per cent. has been the legal rate. Plaintiffs gave the Baxters their first note to Defendant for $4500 June 9, 1874, and from then on up until April 1, 1878, when 6 per cent. became the State rate Defendant on all the different renewals charged no more than the state rate.

From what we have stated we maintain the petition presented no cause of action. The amendment filed five days afterwards, but which Def't was never summoned to answer endeavors to cure petition by saying the charging of more than the State rate *was knowingly* done. No answer was filed to this amendment as Defendent was never summoned or legally before the court on this amendment. The answer that was filed does not show it responds to the amended petition but answers the original petition. The amended petition was intended to cure the defect named in the original petition. It is an elementary principle, and well settled in Kentucky, that a summons must issue on an amended petiton presenting a cause of action where the original petitition fails so to present it.

Cecil vs. Sowards, 10 Bush, 96. (Ky.)

Rutledge vs. Vanmeter, 8 Bush, 354. (Ky.)

Joyes vs. Hamilton, 10 Bush, 544. (Ky.)

L. C. & Lex. R. R. Co. vs. case 9 Bush, 728. (Ky.)

Besides, the Court will notice that the Plaintiff in Error seeks to go back some sixteen years to have forfeited interest incorporated in one of the notes, and on other notes, for the same purpose, to go back eight or ten years, covering renewals made each three or more each year. Reason, public policy and our Statutes provide a time behind which you can not go to investigate or sue for real or supposed wrongs. In cases involving usury by National

Banks interest paid over two years can not be recovered by the payor. During all the years until this suit was brought the bank had the interest in the body of the notes, holding and using as its own property, adversely to the world and with the knowledge and consent of the Baxters, Lafe and Ed. By the Ky. Stats., Sec. 2515, an action upon a liability created by Statute, an action for a penalty or forfeiture, an action for withholding or detaining personal property, shall be commenced within five years next, after the cause of action accrued.

We suggest such a transaction as the one at bar is not criminal in itself, but only wrong because the Statute says so. It is not to the interest of the people for the courts to take up a severe penal Statute and enforce it at the instance of men who were themselves particeps in the transaction, and explore and open up transactions of many past years unless the law in the case presented imperatively demands it be done.

By Section 5198, U. S. Statutes, the courts can not go back in this case, as we suppose, more than two years prior to April 21, 1891, (the day Plaintiff in Error filed his petition in a State Circuit Court) as to interest actually paid, or charged or incorporated in renewals, as a renewal of principal and interest is in effect a payment and re-loan of interest. By the express terms of the Statute no usurious transaction as to interest paid more than two years before suit brought can be effected by such suit. Yet, Plaintiff seeks to go back some sixteen years and inquire through all those years into usurious transactions.

Even where no Statute of limitations directly governs the case courts act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands by refusing to interfere when there has been gross lack in prosecuting rights or long acquiesence in the assertion of adverse rights.

Wagner vs. P-ird, 7 How. 234.
U. S. vs. Moore, 12 How. 209.
Badger vs. Badger, 2 Wall 87.
Godden vs. Kimmel, 9 U. S. 201.

We respectfully ask an affirmance of the judgment of the State Court.

W. J. LISLE,
Attorney for the Marion National Bank.

Counsel for Plaintiff in Error.

BROWN *v.* MARION NATIONAL BANK.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 201. Submitted January 21, 1898. — Decided February 21, 1898.

Section 5198 of the Revised Statutes of the United States prescribing what rate of interest may be taken, received, reserved or charged by a national banking association, makes a difference between interest which a note, bill or other evidence of debt "carries with it, or which has been agreed to be paid thereon," and interest which has been "paid."

Interest included in a renewal note, or evidenced by a separate note, does not thereby cease to be interest within the meaning of section 5198.

If a national bank sues upon a note, bill or other evidence of debt held by it, the debtor may insist that the entire interest, legal and usurious, included in his written obligation and agreed to be paid, but which has not been actually paid, shall be either credited on the note, or eliminated from it, and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit.

The forfeiture declared by the statute is not waived by giving a renewal note, in which is included the usurious interest. No matter how many renewals may be made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on, and the matter is thus brought to the attention of the court, lose the entire interest which the note carries or which has been agreed to be paid.

If, for instance, one executes his note to a national bank for a named sum as evidence of a loan to him of that amount to be paid in one year at ten per cent interest, such a rate of interest being illegal, and if renewal notes are executed each year for five years, without any money being in fact paid by the borrower, — each renewal note including past interest, legal and usurious, — the sum included in the last note, in excess of the sum originally loaned, would be *interest* which that note carried or which was agreed to be paid, and not, as to any part of it, interest paid.

If the note when sued on includes usurious interest, or interest upon usurious interest, agreed to be paid, the holder may elect to remit such interest, and it cannot then be said that usurious interest was paid to him.

If the obligee actually pays usurious interest as such, the usurious transaction must be held to have then, and not before, occurred, and he must sue within two years thereafter.

THE case is stated in the opinion.

Mr. E. J. McDermott and *Mr. H. W. Rives* for plaintiff in error.

Mr. W. J. Lisle for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case was twice before the Court of Appeals of Kentucky. The first judgment of the court of original jurisdiction was reversed in that court, and the cause was remanded for further proceedings. 92 Kentucky, 607.

The present appeal brings up for review the final judgment rendered by the Court of Appeals of Kentucky on a second appeal to that court.

The case requires the construction of certain provisions of the Revised Statutes of the United States relating to national banking associations.

Section 5197 authorizes a national banking association to take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at the rate allowed by the laws of the State, Territory or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State. When no rate is fixed by the laws of the State, Territory or district, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run.

Section 5198 provides: "The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; pro-

vided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

The last section clearly makes a difference between interest which a note, bill or other evidence of debt held by a national bank, "carries with it or which has been agreed to be paid thereon," and interest which has been "paid." Interest included in a renewal note, or evidenced by a separate note, does not thereby cease to be interest within the meaning of section 5198 and become principal.

If a bank, which violates that section, sues upon the note, bill or other evidence of debt held by it, the debtor may insist that the entire interest, legal and usurious, included in his written obligation and agreed to be paid, but which has not been actually paid, shall be either credited on the note, or eliminated from it, and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit. We say "entire interest," because such are the words of the statute, based on the act of June 8, 1864, c. 106, § 30, 13 Stat. 99, 108, whereas the prior statute of February 25, 1863, c. 58, § 46, 12 Stat. 665, 678, declared that the knowingly taking, reserving or charging a greater rate of interest than was allowed, should be held and adjudged a forfeiture of "the debt or demand" on which usurious interest was taken, reserved or charged.

The forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the usurious interest. No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on, and the matter is thus brought to the attention of the court, lose the entire interest which the note carries or which

has been agreed to be paid. By no other construction of the statute can effect be given to the clause forfeiting the entire interest, which the note, bill or other evidence of debt carries, or which was agreed to be paid, but which has not been actually paid.

It is said that, within the meaning of the statute, interest is "paid" when included in a renewal note, and when suit is brought upon the last note, calling for interest from its date, only the interest accruing on the apparent principal of *that* note is subject to forfeiture. We think that the statute cannot be so construed. If, within the meaning of the statute, interest is "paid" simply by including it in a renewal note, it would follow that as soon as the usurious interest is included in a renewal note, the borrower or obligor could sue the lender or obligee and "recover back . . . twice the amount of the interest thus paid," when he had not, in fact, *paid* the debt nor any part of the interest as such. This cannot be a sound interpretation of the statute. The words "in case the greater rate of interest has been *paid*," in section 5198, refer to interest actually paid, as distinguished from interest included in the note and only "agreed to be paid." If, for instance, one executes his note to a national bank for a named sum as evidence of a loan to him of that amount to be paid in one year at ten per cent interest, such a rate of interest being illegal, and if renewal notes are executed each year for five successive years, without any money being in fact paid by the borrower — each renewal note including past interest, legal and usurious — the sum included in the last note, in excess of the sum originally loaned, would be *interest* which that note carried or which was agreed to be paid, and not, as to any part of it, interest paid.

It is difficult to tell from the record when there were actual payments of usurious interest as such. Sometimes interest is said to have been paid when it is evident that it was only included in a renewal note. But that, as we have said, was not *payment* within the meaning of the statute. *Driesbach* v. *National Bank*, 104 U. S. 52. If the note when sued on includes usurious interest, or interest upon usurious interest,

agreed to be paid, the holder may, in due time, elect to remit such interest, and it cannot then be said that usurious interest was paid to him. *McBroom* v. *Scottish Mortgage & Land Investment Co.*, 153 U. S. 318, 328; *Stevens* v. *Lincoln*, 7 Met. 525, 528; *Saunders* v. *Lambert*, 7 Gray, 484, 486; *Stedman* v. *Bland*, 4 Iredell, Law, 296, 299. If at any time the obligee actually pays usurious interest as such, the usurious transaction must be held to have then, and not before, occurred, and he must sue within two years thereafter.

It is proper to state that the judgment before us for review was not in accordance with the views of the Court of Appeals of Kentucky as expressed when the case was first before that court on appeal. 92 Kentucky, 607. The ruling then made by that court was not followed in the subsequent case of *Snyder* v. *Mount Sterling National Bank*, 94 Kentucky, 231, in which the language of Judge Acheson in *Farmers & Mechanics' Bank* v. *Hoagland*, 7 Fed. Rep. 159, 161, was approved, as follows: "By the terms of the act of Congress [the national bank act] the charging of such rates of interest [in excess of the legal rate] worked a forfeiture of the entire interest which the several notes carried with them. Now such forfeiture was not waived by the giving of subsequent notes, although, as respects them, the agreed rate of interest was a legal rate. They were mere renewals, and given without any new consideration. Nor did the new notes operate as payment of the debts for which they were given. In so far, then, as the notes in suit embraced the forfeited interest, they are without consideration. Moreover, it is an established principle that if there be usury in the original transaction, it affects all consecutive securities, however remote, growing out of it; and neither the renewal of the old, nor the substitution of a new security, between the same parties, can efface the usury. The bank incorporated in the new notes usurious interest, previously charged, as a part of the new principal, and this illegal consideration pervaded the whole subsequent series of notes. Upon each fresh renewal interest was charged upon usurious interest, which had entered into the prior notes as principal."

Counsel for Parties.

It was contended in the Court of Appeals of Kentucky in the present case that its ruling, when the case was first before it, was different from its subsequent ruling in *Snyder* v. *Mount Sterling National Bank*. That court conceded that the two cases were not in harmony on the question whether the bank could recover the usurious interest embraced in the renewal notes. "Nevertheless," the court said, "we hold that the judgment on the former appeal is the law of this case." It was the latter view which made it necessary for the appellants to prosecute the present appeal.

As the judgment in this case did not proceed upon the principles herein stated, but rested upon an erroneous interpretation of the statute, it must be reversed. The necessary calculations can be made in the state court.

For the reasons stated the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.